

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL 74 - 2326

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of

In Proceedings for
an Arrangement

D. H. OVERMYER CO., INC. (Alabama)	No. 73 B 1126
D. H. OVERMYER CO., INC. (Arizona)	No. 73 B 1127
D. H. OVERMYER CO., INC. OF OHIO	No. 73 B 1128
D. H. OVERMYER CO., INC. (Ohio)	No. 73 B 1129
D. H. OVERMYER CO., INC. (California)	No. 73 B 1130
D. H. OVERMYER CO., INC. (Colorado)	No. 73 B 1131
D. H. OVERMYER CO., INC. (Connecticut)	No. 73 B 1132
D. H. OVERMYER CO., INC. (Delaware)	No. 73 B 1133
D. H. OVERMYER CO., INC. (Florida)	No. 73 B 1134
D. H. OVERMYER CO., INC. (Georgia)	No. 73 B 1135
D. H. OVERMYER CO., INC. (Illinois)	No. 73 B 1136
D. H. OVERMYER CO., INC. (Indiana)	No. 73 B 1137
D. H. OVERMYER CO., INC. (Kansas)	No. 73 B 1138
D. H. OVERMYER CO., INC. (Kentucky)	No. 73 B 1139
D. H. OVERMYER CO., INC. (Louisiana)	No. 73 B 1140
D. H. OVERMYER CO., INC. (Maryland)	No. 73 B 1141
D. H. OVERMYER CO., INC. (Michigan)	No. 73 B 1142
D. H. OVERMYER CO., INC. (Massachusetts)	No. 73 B 1143
D. H. OVERMYER CO., INC. (Minnesota)	No. 73 B 1144
D. H. OVERMYER CO., INC. (Mississippi)	No. 73 B 1145
D. H. OVERMYER CO., INC. (Missouri)	No. 73 B 1146
D. H. OVERMYER CO., INC. (Nebraska)	No. 73 B 1147
D. H. OVERMYER CO., INC. (Nevada)	No. 73 B 1148
D. H. OVERMYER CO., INC. (New Jersey)	No. 73 B 1149
D. H. OVERMYER CO., INC. (New Mexico)	No. 73 B 1150
D. H. OVERMYER CO., INC. (New York)	No. 73 B 1151
D. H. OVERMYER CO., INC. (North Carolina)	No. 73 B 1152
D. H. OVERMYER CO., INC. (Oklahoma)	No. 73 B 1153
D. H. OVERMYER CO., INC. (Oregon)	No. 73 B 1154
D. H. OVERMYER CO., INC. (Pennsylvania)	No. 73 B 1155
D. H. OVERMYER CO., INC. (Rhode Island)	No. 73 B 1156
D. H. OVERMYER CO., INC. (Tennessee)	No. 73 B 1157
D. H. OVERMYER CO., INC. (Texas)	No. 73 B 1158
D. H. OVERMYER CO., INC. (Utah)	No. 73 B 1159
D. H. OVERMYER CO., INC. (Virginia)	No. 73 B 1160

(continued on cover page 2)

BRIEF OF DEBTORS-APPELLANTS

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D. H. OVERMYER CO., INC. (Washington)
D. H. OVERMYER CO., INC. (Wisconsin)
DHORE COMPANY, INC.
OVERMODAL TERMINALS, INC.

No. 73 B 1161
No. 73 B 1162
No. 73 B 1189
No. 73 B 1175

Debtors-Appellants,

-and-

ROBERT P. HERZOG,

Receiver-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF DEBTORS-APPELLANTS

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BRIEF OF DEBTORS-APPELLANTS

Issues Presented for Review

1. Debtors-Appellants adopt the issues presented for appeal by the Receiver-Appellant;
2. Is the finding by the Bankruptcy Judge that the Debtors' Plan of Arrangement is not feasible, clearly erroneous?
3. Was the District Court's finding that the Debtors cannot be rehabilitated predicated upon an erroneous interpretation of the Debtors' Plan of Arrangement by the Bankruptcy Judge?
4. Was the District Court's determination that the "windfall" was largely illusory at variance with the specific findings by the Bankruptcy Judge that a "windfall" existed?
5. Did the lower court erroneously utilize lack of feasibility as the cornerstone to determine the equitable considerations in determining right to possession of the warehouses?

STATEMENT OF THE CASE

History of the Debtors

Prior to filing Chapter XI on November 16, 1973, Debtors-Appellants (hereinafter referred to collectively as "Appellants", "Debtors" or "Overmyer"), owned, leased and operated more than two hundred (200) warehouse facilities comprising thirty-two million square feet, located throughout the United States. A typical warehouse consisted of 120,000 square feet, parking facilities and truck bays. Approximately thirty million square feet represented leased buildings and two million square feet, fee ownerships.

A separate Overmyer corporation was organized in each state in which a leased warehouse operated. In all, thirty-six state corporations were organized and in operation at the time of the commencement of these proceedings. The state corporations are wholly owned subsidiaries of D. H. Overmyer Co. Inc. (Ohio), a debtor in the captioned proceedings.

Chapter XI Proceedings

Appellants filed separate Chapter XI petitions pursuant to Section 322 of the Bankruptcy Act, and there has been no substantive or procedural consolidation of the individual estates. Utilization of a combined caption for purposes of the within appeal is consistent with the manner in which the Bankruptcy Court and the District Court viewed the proceedings below. (Appendix p. 35, footnote 6).

On November 29, 1973, the Bankruptcy Judge adjudicated each of the Debtors a bankrupt and appointed Robert P. Herzog as trustee in bankruptcy to liquidate their respective assets. On December 5, 1973, the order of adjudication in bankruptcy was vacated and Mr. Herzog was appointed Receiver, with authority to continue the business of each of the Debtors.

The Receiver and Debtors have elected to prosecute their appeals with respect to the same leases. Debtors are abandoning their appeal with respect to all other leased locations other than those set forth in the Receiver's brief to this Court. Debtors adopt the Receiver's brief set forth in Volume 2 of Appellants Appendix as their brief to this Court. Debtors' also adopt the brief filed by the Receiver in support of the within appeal and will not expound further on the points raised therein. The Receiver and the Debtors are in harmony with the legal points raised on the facts and law cited therein.

Debtors' brief herein is limited to the issues concerning windfall; the Debtors' filed Plan of Arrangement; (Appendix Pages 56-58) and the feasibility thereof and the findings of the Bankruptcy Court and the District Court with respect to said Plan of Arrangement. Included in the discussion concerning the Debtors' Plan of Arrangement, is the question of the feasibility of said Plan raised by the Bankruptcy Court and the erroneous determination by the District Court on review, that the Debtors could not be rehabilitated.

POINT I

IF POSSESSION OF THE BUILDINGS
IN QUESTION ARE GIVEN TO THE
LANDLORDS, THEY WILL RECEIVE
AN UNCONSCIONABLE WINDFALL AND
FRUSTRATE THE REHABILITATION
PURPOSES OF CHAPTER XI OF THE
BANKRUPTCY ACT

The Bankruptcy Judge in his July 23, 1974 decision (Appendix p. 39) found "****the sublease operations of the debtor yield a substantial profit.", relating to leases which are the subject matter of the within appeal. Further, the Bankruptcy Judge stated (Appendix p. 32) in reference to the differential between the rents collected by the Debtors and the rents payable to Appellees, "****the total of the rents were in excess of the amounts due the landlord-purchaser under the terms of the sale and leaseback to the debtor."

Notwithstanding such findings by the Bankruptcy Judge, (Appendix p. 54) concluded that the "windfall" i.e., the difference between the amounts collected by the debtors and the amounts paid the landlords, was part of what the Appellees had bargained for when they entered into their sale leaseback transactions. The Bankruptcy Judge held that the equitable considerations presented by the question of "windfall" were simply not robust enough to turn the Appellees away and prevent their recapture of the properties unencumbered by the Debtors' leases. In the District Court, the Judge in his decision of September 27, 1974, affirming the Bankruptcy Court's decision

stated (Appendix p. 17) "In view of the short term nature of the subleases and the expenses involved in operating the warehouses, this so-called 'windfall' is largely illusory and does not shift the balance of the equities." The District Court footnoted the aforementioned finding by footnote 7 (Appendix p. 17) and indicated that the record in the lower court did not contain proof of the value of any "windfall". Each of the proceedings involving an Appellee-Landlord, included testimony concerning the differential between the rent collected by the Debtors from its subtenants and the rent, taxes and mortgages payable by the Debtors to discharge their lease obligation to the Appellees. In each instance, there was a substantial profit shown and Appellants (Appendix, Volume 2, p. 119-120) sets forth a detailed summary of the contested warehouse leases which reflect the annual gross profit per leased location. This schedule sets forth the balance of the lease term including renewal options for each location and deducts from the annualized gross profit the amount computed by the Bankruptcy Judge on April 18, 1974 (document No. 32 of the Record on Appeal). The summary statement referred to herein is a compilation of the trial transcript testimony and the documents introduced into evidence. These are not subject to dispute since for the most part, they represent stipulated statements made before the Bankruptcy Judge on the part of the Receiver, Debtors and Appellees.

The Bankruptcy Judge concluded, based upon the testimony elicited, by the Receiver concerning the overall

administration costs applicable to each of the leased properties, that a 120,000 square foot warehouse bore an annual overhead of \$20,000.00. A review of the summary discloses with respect to the 15 properties which are the subject of the within appeal, annual net profits to the Debtors and Receiver in excess of \$500,000.00.

Debtors' believe that this Court must accept the Bankruptcy Judge's determination that a "windfall" exists and that each of the leases showed substantial profit to the estates. The District Court's conclusion of the illusory nature of the windfall is not supported by the lower court record and if this Court believes that a further hearing with respect to said profits is required then the case should be remanded for further hearing.

The finding of "windfall" place the within appeal within the confines of the decision of Queens Boulevard Wine & Liquor Corp., vs. Blum, et al, 73-1512, slip sheet opinion at 4112. A decision of this Court dated June 11, 1974.

Debtors' in the lower court argued that the method utilized by the Bankruptcy Judge to determine the extent of the "windfall" was not a proper measure of value. The Bankruptcy Judge in determining a deduction from gross profit per warehouse of \$20,000.00 per annum, in essence, had measured the Debtors' net profit after deductions for extraordinary Chapter XI and receivership costs, as the value of the leasehold rather than the value to the landlord-appellees of their property free of lease and unencumbered

Appraisals of warehouse leases are the subject of study (see "Encyclopedia of Real Estate Appraising" 1968 Prentice Hall). This treatise, utilizing the income approach to appraising the leasehold value of a warehouse sets forth;

"The value of the tenant's leasehold is measured by the difference between the rent payable under the lease and the higher rentals prevailing in the market at the time of the appraisal."

Applying the foregoing, the rent payable under the specific leases to Appellees, was a specific amount contained in a long term lease document and the amounts being paid by subtenant customers of the Debtors was the prevailing market rent in a given location. The testimony elicited before the Bankruptcy Judge, i.e., evidence disclosing the difference between the rent payable to Appellees and the rents collected by the Receiver-Debtors complies with the method utilized to determine value of the Debtors' leasehold interests on an income approach method. The foregoing treatise notes (p. 507 and 508) that in order to arrive at net annual income from warehouse property, where the income approach to value is utilized, the gross annual income, present and future vacancies, and the expenses must be determined. These factors were included in the trials conducted before the Bankruptcy Judge and the result was "windfall".

POINT II

THE COURTS BELOW IMPROPERLY
AND ERRONEOUSLY UTILIZED
FEASIBILITY AND BEST INTEREST
AS THE TEST TO DETERMINE THAT
THE DEBTORS' VALUABLE LEASE-
HOLDS SHOULD BE FORFEITED

The District Judge referred to the Debtors' Plan of Arrangement dated January 7, 1974, as one "which simply cannot be characterized as feasible" (Appendix p. 24-25), and the Court concluded that because of the nature of the Debtors' business operations and its failure to meet its several obligations that the Debtors' could not be rehabilitated. (Appendix p. 24-25).

The Bankruptcy Judge in his decision of July 23, 1974, referred to Debtors' Plan of Arrangement as carrying "pie-in-the-sky" elements (Appendix p. 33) and thus, concluded that the Debtors' Plan of Arrangement was not feasible or in the best interests of its creditors. The District Judge accepted the aforesaid finding and conclusion relating to the Plan of Arrangement, notwithstanding that the Plan of Arrangement itself was misconstrued by the Bankruptcy Judge. There has never been a hearing on feasibility or best interest with respect to the Plan as required by the provisions of Section 366 of the Bankruptcy Act.

Both Courts relied upon the lack of feasibility of the Debtors' Plan of Arrangement as the cornerstone for determining the monetary equities of the case in favor of the Appellees.

The Bankruptcy Judge's understanding and interpretation of the Debtors' Plan of Arrangement was simply erroneous.

Debtors' Plan of Arrangement (Appendix p. 56-58) insofar as said Plan relates to payment to Appellees and other general creditors, established two classes of general creditors to participate in the distribution. Class 1 creditors include those who are appellees in this appeal and they were to receive cash upon confirmation of the Debtors' Plan of Arrangement equivalent to 100% of the amounts of pre-petition arrearages. Class 2 creditors, were all other general unsecured creditors of the Debtors included a number of landlords whose leases had been rejected by the Debtors and the Receiver and who were entitled to file three year damage claims under the provisions of Section 353 of the Bankruptcy Act. Reviewing the summary of profit to the estates with respect to each of the leased locations set forth in the summary of contested warehouse leases. (Appendix p. 119-120, Volume 2), the Court can readily determine the nature and extent of the pre-petition lease defaults which aggregate \$417,980.00, a sum significantly less than the annualized net profit of in excess of \$500,000.00 set forth in said summary. The Bankruptcy Judge in his analysis of the Debtors' Plan of Arrangement stated in his decision (Appendix p. 53) "The debtor's arrangement (popularly styled its plan) calls for full payment of all pre petition liabilities -- but not at the time the Court confirms the arrangement; rather over many years." The failure of the Bankruptcy Judge to note the distinguishing factors and method of payment between

Class 1 and Class 2 creditors as set forth in the Plan; together with the Judge's reference (Appendix p. 34) to \$12,000,000.00 in unpaid pre-petition obligations might form the basis for a conclusion that the Debtors' Plan was not feasible. The conclusion, however, was erroneous, and was predicated upon a misinterpretation of the Plan and a failure to take into account the amount of the pre-petition arrears owed to Appellees, which amounted to less than \$500,000.00. The foregoing would leave \$11,500,000.00 of debts owed to Class 2 creditors under the Debtors' Plan of Arrangement, payment of which, was to be at the rate of 1% every second month following the date of the entry of the Order of Confirmation. Some of the Debtors are fee owners of extensive parcels of improved real property which are not subject to the disputes in this appeal. There are also landlords of the Debtors who are not before this Court. Had the Debtors' Plan of Arrangement reached the stage where a hearing on feasibility and best interests under the provisions of Section 366 of the Bankruptcy Act could be held, it would have been determined that debt service under the Plan of Arrangement to discharge the Debtors' obligations to Class 2 creditors could flow from the operations of Debtors' real property interests in the other leaseholds and fee interests which are not before this Court.

The ability of a Bankruptcy Court to hold a hearing on feasibility of the Debtors' filed Plan of Arrangement depends upon a condition precedent that the requisite acceptances of the arrangement prescribed by Section 362(1) of the Bankruptcy Act be obtained. Section 362(1) refers to an arrangement accepted in writing by a majority in number and amount of all creditors of each class. Each of the Appellees herein would fit into the category of Class 1, and upon entry of an Order of Confirmation, each of the Appellees would have received their pre-petition arrearages and would have been made whole and would, therefore, not be creditors to await a long term pay out as provided for with respect to Class 2 creditors. By determining the Debtors' Plan of Arrangement to be unfeasible, the Court has determined without hearing that on the date of the entry of an order of confirmation, the Debtors would not be able to come forward with the amount of arrearages owed to the Appellees. Since no factual hearing was ever held before the lower court on these issues, the Debtors' can only argue to this Court that such a hearing is required and that a remand for that purpose would substantiate the ability of the Debtors' to raise \$500,000.00 to cure the pre-petition arrearages to Appellees. Had the Bankruptcy Judge made no reference to the Debtors' Plan of Arrangement and not considered the so-called "pie-in-the-sky" elements which he thought existed, and had the Court merely look to the amount of the windfall and not considered whether or not the Debtors' Plan was capable of being carried forward, the conclusion by the Bankruptcy Judge may have been contrary to his decision of July 23, 1974.

CONCLUSION

The cornerstone of the lower court decisions having been improvidently grounded in the questions of feasibility and best interest of the Debtors' Plan of Arrangement, should not have formed the basis for equitable considerations concerning the valuable nature of Debtors' leasehold interests and accordingly, the lower court order should be reversed in all respects.

Respectfully submitted,

LEVY, LEVY & RUBACK
Attorneys for Debtors-
Appellants

Of Counsel: Gary L. Blum, Esq.
Burton R. Lifland, Esq.

AFFIDAVITS OF SERVICE

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS

being duly sworn deposes
and says: On *November 1st*, 1974 I served the
within ~~record on appeal~~ brief ~~appendix~~ on *Wachtell*
Lipton Rosen & Katz the attorneys for the *Landlords of Boston 6, 7, Miami 2*
~~dependent~~ by leaving mailing ^{two} three copies thereof
at his office located at *299 Park Avenue*
New York, N.Y.

Sworn to before me
this *1st* day of
November, 1974

Bert Myers

Theresa Corless
THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS

being duly sworn deposes
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Margolis & Ryan the attorneys for the *Landlords of Buffalo 2, Columbus 3,*
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at his office located at *350 Fifth Avenue*
New York, N.Y.

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Tally & Mantell the attorneys for the Landlords of San Francisco 3
~~appellants~~ respondent by leaving mailing ^{two} three copies thereof
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New York, N.Y.

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Nessen Kamin & Soll the attorney for the Landlords of Minneapolis 4
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New York, N.Y.

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at his office located at One Chase Manhattan Plaza
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COUNTY OF NEW YORK

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Rodin & Goodman the attorneys for the Landlords of Jacksonville 3
~~appellants~~ respondent by leaving mailing ~~three~~ ^{five} copies thereof
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New York, N.Y.

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this 1st day of

November, 1974

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Cleveland, Ohio 44115

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BERT MYERS

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~~Henry & Brecker~~ the attorney for the Landlords of Edison 24
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at his office located at 40 Exchange Place
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Bert Myers

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STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS

being duly sworn deposes
and says: On November 1st, 1974 I served the
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~~Margellina & Clay~~ the attorney for the Landlords of Richmond 1
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STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes
and says: On November 1st, 1974 I served the
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William S. Kay the attorney for the Landlords of St. Louis 2 & 3
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at his office located at 118-21 Queens Boulevard
Forest Hills, N.Y. 11375

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Bert Myers

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Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes
and says: On November 1st, 1974 I served the
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Lipton & Lipton the attorney for the Receiver-
appellant respondent by leaving mailing three copies thereof
at his office located at 292 Madison Avenue
New York, N.Y.

Sworn to before me
this 1st day of
November 1974

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Qualified in Bronx County
Term Expires March 30, 1976

